California Office of ADMINISTRATIVE LAW

Gray Davis
Governor

2002 OAL DETERMINATION NO. 7-L
(Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 123(c))

December 26, 2002

Jim Whalen
Labor Relations Representative
California State Employees Association
1108 "O" Street, 4th Floor
Sacramento, CA 95814

Re: Request for determination concerning the Stephen P. Teale Data Center's requirements for verification of an employee's or family member's illness to justify the use of sick leave; OAL file no. 00-011

Dear Mr. Whalen:

You requested the Office of Administrative Law (OAL) to issue a determination as to whether Attendance Restriction Memo, Sample 5, issued by the Stephen P. Teale Data Center (Teale) contains a "regulation" which must be adopted pursuant to the Administrative Procedure Act (APA; Gov. Code sec. 11340 et seq.). In particular, you challenge a paragraph in the sample memo that sets forth information or documentation that an employee must provide in order for the agency head to be able to determine whether the use of sick leave is justified.

In issuing a determination, OAL renders an opinion as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600, which should have been, but was not adopted pursuant to the APA.

Government Code section 11342.600 defines "regulation" to mean "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."

The Attendance Restriction Memo, Sample 5, contains the following paragraph that you specifically challenge:

> "1. Sick Leave:
>
> "All absences for health reasons, self or family, must be substantiated with a doctor[']s statement verifying the dates of disability and the date of release to return to work. The statement must be signed by an authorized physician or licensed practitioner and verify whether you, or your family member, were seen. The physician's or licensed practitioner's name and telephone number must be legible. If you were ill, the statement must report that you were physically unable to work for the period of absence. If you were advised by the medical facility not to be seen in person, the statement must reflect that advice. We will not accept a statement that simply states, 'Patient stated he/she was ill and unable to work'. Failure to bring the required statement upon returning to work will result in determining that you were not legitimately absent and in reporting the unapproved absence as Absence Without Leave (AWOL). Such failure may result in adverse action."[1]

In determining whether a challenged rule is a "regulation" that should be adopted pursuant to the APA, OAL first looks to see whether the challenged rule is merely a restatement of existing law. Applicable in this determination is a statute, a regulation, and a Memorandum of Understanding.

Government Code section 19859 provides in part:

> "(a) . . . Each state officer or employee is entitled to [sick] leave with pay, on the submission of satisfactory proof of the necessity for sick leave as provided by rule of the department. [Emphasis added.]"

Pursuant to Government Code section 19859, the Department of Personnel Administration adopted section 599.749 of title 2 of the California Code of Regulations (CCR) (hereafter "CCR section 599.749"), which states as follows:

> "The appointing power shall approve sick leave only after having ascertained that the absence was for an authorized reason and may require the employee to submit substantiating evidence including, but not limited to, a physician's certificate. If the appointing power does

1. The requester submitted the Attendance Restriction Memo, Sample 5, as an attachment to Teale's Policy No. 3150, which had the last revision date of 11/24/98. OAL is limiting its review and determination to only the paragraph in the Sample 5 memo that was specifically challenged by the requester dealing with sick leave verification.

In its determination request (letter to OAL dated April 18, 2000), CSEA states that the language contained in the challenged Attendance Restriction Memo, Sample 5, is "very similar to [the rules challenged in] the 1998 OAL Determination No. 36" dealing with Attendance Restriction Guidelines issued by the Department of Motor Vehicles. While the challenged provisions may be similar, in OAL's view there are substantial differences in the facts and law applicable in the current determination. Consequently, OAL feels it is not bound by its previous findings in 1998 OAL Determination No. 36 for the following reasons: 1) the challenged provisions are similar, but not the same, 2) the MOU applicable to the 1998 determination is significantly different than the MOU applicable to the current determination, 3) Government Code sections 19570 – 19572, dealing with adverse actions, were not discussed in the 1998 determination (see discussion on pp. 4-5, *infra*), and 4) the APA exemption found at Government Code section 11340.9, subdivision (f) (Stats. 2000, c. 1060, sec. 5) went into effect after the 1998 determination was issued.

not consider the evidence adequate, the request for sick leave shall be disapproved. [Emphasis added.]"

Additionally, at the time the determination request was accepted for review by OAL there was a binding agreement, a Memorandum of Understanding (MOU), between the California State Employees Association (CSEA) and the State of California.[2] In the MOU, Article 8.2 states in part the following:

"8.2 Sick Leave

". . . .

"D. The department head or designee shall approve sick leave only after having ascertained that the absence is for an authorized reason and may require the employee to submit substantiating evidence including, but not limited to, a physician's or licensed practitioner's verification. The State recognizes the confidential nature of the relationship between the health care provider and patient. However, such substantiation shall include, but not be limited to, the general nature of the employee's illness or injury and prognosis (i.e., the anticipated length of the absence, any restrictions upon return to work that prevent the employee from performing the full range of his/her normal work assignment and anticipated future absences). If the department head or designee does not consider the evidence adequate, the request for sick leave shall be disapproved. Upon request, a denial of sick leave shall be in writing stating the reason for denial.

"E. An employee may be required to provide a physician's or licensed practitioner's verification of sick leave when:

1. The employee has a demonstrable pattern of sick leave abuse; or
2. The supervisor believes the absence was for an unauthorized reason.

[Emphasis added.]"

The MOU was reached pursuant to Government Code sections 3512 through 3524, known as the Ralph C. Dills Act ("Dills Act"). The Dills Act sets forth the statutory law governing relations between the state and its employees. One purpose of the Dills Act is "to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between the state and public employee organizations."[3]

2. The request for determination was first submitted to OAL on December 22, 1999; however, because there was insufficient information regarding the challenged rule, OAL did not accept the request for review until July 7, 2000, after additional information was submitted by the requester. For purposes of this summary determination letter, OAL reviewed the documents submitted, including the Attendance Restriction Memo, Sample 5, and the MOU as they existed on the date of acceptance. All references to the MOU are to the MOU effective July 1, 1999 through July 2, 2001, for Bargaining Unit #1 because the information submitted by the requester dealt with an employee covered by Bargaining Unit #1 and, according to the declaration submitted by Teale with its response to the determination request, over 95% of Teale employees are within Bargaining Unit #1 represented by CSEA.

3. Government Code section 3512.

Government Code section 3517.5 of the Dills Act provides, "If agreement is reached between the Governor and the recognized employee organization, they shall jointly prepare a written memorandum of such understanding which shall be presented, when appropriate, to the Legislature for determination." Government Code section 3517.6 explains that the provisions of a MOU are controlling in cases of conflict with certain statutory provisions, including section 19859 of the Government Code, *supra*.

A comparison of the MOU to Government Code section 19859 and CCR section 599.749 reveals that there is no conflict among the three, thus, all three are controlling in the matter to be addressed in this determination.

In our view, the challenged paragraph in the Sample 5 memo, quoted in full above, contains rules that can be found in Government Code section 19859, CCR section 599.749, or the MOU, or are the only legally tenable interpretation of these legal provisions.[4] For example, CCR section 599.749 and the MOU provide that sick leave shall be approved only after the agency has ascertained that the sick leave was for an authorized reason. The agency may require the employee to submit substantiating evidence, including a physician's or licensed practitioner's verification, in order to make that determination. The challenged requirement that such verification be in writing and be legible, including the name and telephone number of the physician, is the only way an agency would know which physician to contact to verify and ascertain whether the absence is for an authorized reason. Furthermore, requiring that the physician's verification be more than the statement: "Patient stated he/she was ill and unable to work" is merely another way of restating the MOU provision that "such substantiation shall include, but not be limited to, the general nature of the employee's illness or injury and prognosis." Thus, the verification rules contained in the challenged Sample 5 memo do not further interpret or supplement the provisions in CCR section 599.749 or the MOU.

Additionally, Government Code section 19570 defines "adverse action" as meaning "dismissal, demotion, suspension, or other disciplinary action. . . ." Government Code section 19571 states that adverse action may be taken against any employee for any cause for discipline listed in Government Code section 19572. Section 19572 states as follows:

> "Each of the following constitutes cause for discipline of an employee . . . :
>
> "(j) Inexcusable absence without leave."

Thus, the last part of the Sample 5 paragraph, "Failure to bring the required statement upon returning to work will result in determining that you were not legitimately absent and in reporting the unapproved absence as Absence Without Leave (AWOL). Such failure may result in adverse action[,]" is merely a restatement of sections 19570, 19571 and 19572 of the Government Code, as

4. Generally, all state agencies in the executive branch of government and not expressly exempted by statute are required to comply with the rulemaking provisions of the APA. *(Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Gov. Code, secs. 11342.520 and 11346.) Government Code section 11340.9, subdivision (f), provides for such an exemption to the APA. It states that the APA shall not apply to "[a] regulation that embodies the only legally tenable interpretation of a provision of law."

well as CCR section 599.749 and the MOU, e.g., if the appointing power does not consider the evidence adequate, the request for sick leave shall be disapproved.

In summary, verification of sick leave usage and submission of substantiating evidence is required by Government Code section 19859, title 2, CCR, section 599.749, and the legally binding MOU provisions. The challenged sick leave paragraph of the Attendance Restriction Memo, Sample 5, does not further interpret or supplement these provisions of law. Thus, the requirements for verifying sick leave and submitting substantiating evidence as found in Sample 5 are not "regulations" required to be adopted pursuant to the APA. The rules contained in the challenged paragraph of Sample 5 are merely restatements of law or are the only legally tenable interpretation of these legal provisions.[5]

Sincerely,

Sheila R. Mohan
Acting Director and Chief Counsel

Debra M. Cornez
Senior Counsel

_____
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5. Section 123 of title 1 of the CCR provides in part the following:

> "(b) OAL shall not accept for filing any request for determination if OAL finds that the state agency rule being challenged:
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> (1) has been superseded;
> (2) has expired by its own terms;
> (3) has been declared in writing by the state agency under penalty of perjury, in accordance with Code of Civil Procedure Section 2015.5, to have been rescinded or to no longer be in effect;
> (4) has been nullified by a court in a judgment that has become final;
> (5) is contained in a regulation adopted pursuant to the APA;
> (6) is contained in a California statute;
> (7) is clearly within the scope of an express statutory exemption from the APA; or
> (8) is the same rule, or is substantially the same (i.e., has the same effect) as a rule from the same state agency, on which OAL has already issued a determination.
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> "(c) If, after accepting a request for determination, OAL finds that the challenged state agency rule falls within subsection (b), OAL may at any time issue a summary determination letter instead of a determination pursuant to sections 124, 125, and 126. Any summary determination letter shall be issued pursuant to section 127. [Emphasis added.]"

This summary determination letter is being issued pursuant to section 123, subsection (c), because the challenged agency rule falls within section 123, subsections (b)(5), (6) and (7), i.e., the rules set forth in the challenged paragraph are contained in the Government Code, CCR section 599.749, or the MOU, or fall within the APA exemption of being the only legally tenable interpretation of these laws.

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